IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DANIEL RAYMOND LONGAN, Appellant.	No. 37942-2-II UNPUBLISHED OPINION

Houghton, J. — Daniel Longan appeals his convictions for three counts of first degree assault with firearm enhancements, arguing that the State failed to present sufficient evidence to convict him.[1] In a statement of additional grounds (SAG),[2] he raises 12 additional claims. We affirm.[3]

FACTS

At about 3:30 a.m. on March 20, 2007, in a high crime area of Longview, Officer Michael Berndt saw a green Honda turn quickly into an alley without signaling. Berndt followed the vehicle into the alley. The vehicle accelerated to 50 mph and turned onto 32nd Avenue without

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[1] Longan does not appeal from his two other convictions for taking a motor vehicle without permission and attempting to elude a pursuing police vehicle, both with firearm enhancements.

[2] RAP 10.10.

[3] A commissioner of this court initially considered Longan's appeal as a motion on the merits under RAP 18.14 but later transferred it to a panel of judges.

signaling. Berndt activated his overhead lights and pursued the vehicle. Continuing to speed, the vehicle made a turn onto Washington Way without signaling. As the vehicle reached 60 mph, Berndt activated his siren. As the vehicle turned onto Nichols Boulevard, Brandt saw the passenger's arm out the window. After the vehicle turned onto 21st Avenue, Brandt saw three muzzle flashes in his direction from the passenger window and heard three loud bangs. He notified dispatch that shots were fired at him and continued his pursuit. After the vehicle turned onto Cypress Street and back onto 20th Avenue, Brandt saw two more muzzle flashes at him from the passenger window and heard two more loud bangs.

Officer Kevin Sawyer joined in the pursuit. The vehicle crossed the Lewis and Clark Bridge into Oregon. After the vehicle turned onto Highway 30, Brandt and Sawyer saw another muzzle flash and heard another loud bang come from the passenger window of the Honda. The vehicle continued to speed between 70 and 90 mph on Highway 30 until it hit spike strips and crashed. The officers arrested the vehicle's driver, Longan, and passenger, Heather Van Hooser, after they attempted to flee.

The State charged Longan with three counts of first degree assault, all with firearm enhancements. A jury found Longan guilty on all three counts.

ANALYSIS

sufficiency of the Evidence

Longan argues that the State failed to present sufficient evidence that he was an accomplice to Van Hooser's assaults on Brandt and Sawyer. Sufficient evidence supports a conviction if any rational trier of fact could find the essential elements of the crime beyond a

reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). An appellant claiming insufficiency of the evidence "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Thomas*, at 874 (quoting *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

To prove accomplice liability for first degree assault, the State had to prove that Longan "[w]ith knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it." RCW 9A.08.020(3)(a). Longan argues that the State presented no evidence that he knew Van Hooser was going to fire at the officers. *State v. Luna*, 71 Wn. App. 755, 759, 862 P.2d 620 (1993); *State v. Robinson*, 73 Wn. App. 851, 855, 872 P.2d 43 (1994). He argues the State presented no evidence that he solicited, commanded, encouraged or requested that Van Hooser fire at the officers. And he argues that the State presented no evidence he aided or agreed to aid Van Hooser in firing at the officers. Therefore, he contends, the State did not present sufficient evidence that he was an accomplice to Van Hooser's assaults.

Considering the evidence in the light most favorable to the State, Longan drove a stolen car at high speed to evade pursuing police vehicles. He ignored the officers' lights and sirens. Before each instance of Van Hooser shooting at the officers, Longan made hard turns, which reduced the angle between his vehicle and the police cars, making it easier for Van Hooser to fire at the officers. A rational trier of fact could find that Longan's hard turns were knowing actions

intended to aid Van Hooser in firing at the officers. Thus, the State presented sufficient evidence that Longan was an accomplice to Van Hooser's three first degree assaults, and his argument fails.

SAG ISSUES

Longan raises 12 issues in his SAG. First, he argues that his trial counsel was ineffective because he did not request lesser-included instructions for second degree assault. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456-57, 6 P.3d 1150 (2000). To demonstrate ineffective assistance of counsel, a defendant must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Horton*, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). To demonstrate prejudice, Longan must show a reasonable probability trial outcome would have differed. *Strickland*, 466 U.S. at 694; *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). If a defendant fails to establish either element, we need not address the other element. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

Longan does not show deficient performance by his trial counsel. A defendant is entitled to a lesser-included instruction "if the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater." *State v. Warden*, 133 Wn.2d 559, 563, 947 P.2d 708 (1997). Longan does not show how the evidence would have permitted a jury to rationally find that he was guilty of second degree assault but innocent of first degree assault. He does not show that he was entitled to lesser-included instructions and, therefore, does not show deficient performance by his trial counsel.

Second, Longan argues that his trial counsel's performance was deficient because he did

not challenge the following prospective jurors for cause:

> Juror A, because he had been the victim of a car prowl and because he thought a defendant should testify if he did not commit the crime charged;[4]
> Juror B, because she said she had summed up the case during voir dire;[5]
> Jurors C and D, because Juror C is a long time acquaintance of Juror D, whose brother-in-law is a Longview police officer; and
> Juror E, who said he would have difficulty being fair in a drug case.

None of these jurors met the standards for challenges for cause contained in RCW 4.44.160 and .170. Longan's trial counsel's performance was not deficient in not challenging them for cause.

Third, Longan argues his trial counsel's performance was deficient because he did not sufficiently cross-examine the following witnesses: Argentino Cifuentes, Anna Hauser, Tory Shelton, Jeremy Johnson, Nolan Borders, Joseph Hogue, Michael Watts, Timothy Deisher, Shawn Close, Matt Headley and Mark Langlois. Cifuentes was the owner of the stolen Honda that Longan was driving. Hauser and Officer Johnson testified to hearing three gun shots. Officers Shelton, Borders, Hogue, Watts, Close and Headley testified about the pursuit and stop of the vehicle. Officers Deisher and Langlois testified about follow-up investigations of the vehicle and the route of the pursuit. Longan does not show what effect more extensive cross-examination would have had. Longan's trial counsel's decision to not more extensively cross-examine these witnesses was not deficient performance.

Fourth, Longan argues that the three assaults were part of the "same criminal conduct."

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[4] Juror A continued by stating that he would not hold it against the defendant if he did not testify.

[5] Juror B said she would "definitely go with the evidence" if it was different from how she had summed up the case "in her mind." Excerpt Verbatim Report of Proceedings at 79-80.

He is mistaken. For crimes to be part of the "same criminal conduct," they must have been "committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The three assaults took place at different times; in different places; and in the case of the third assault, involved another victim. The crimes are not parts of the same criminal conduct.

Fifth, Longan argues that the trial court erred in failing to excuse Jurors A, B, C, D, and E, for the reasons stated above. But, as stated above, none of those jurors met the standard for being excused for cause. The trial court did not err.

Sixth, Longan argues that the trial court erred in admitting a key ring with shaved keys, potential burglar's tools, found in his vehicle after the crash. He also argues that the trial court erred in allowing an officer to testify that he wore a bulletproof vest during the chase. We review the trial court's admissibility determinations for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007). Longan shows no such abuse of discretion and his argument fails.

Seventh, citing *State v. Brown*, 100 Wn. App. 104, 995 P.2d 1278 (2000), Longan argues the trial court erred by imposing consecutive firearm sentencing enhancements. But after *Brown*, the legislature clarified that all firearm enhancements "run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements." RCW 9.94A.533(3)(e). The trial court did not err in running the multiple firearm enhancements consecutive to Longan's base sentence and consecutive to each other.

Eighth, Longan argues that the trial court denied him his right to a public trial by

questioning a potential juror in the hallway during voir dire. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004). But the trial court did not close the courtroom, as the judge did in *Orange*. He conducted the questioning of the potential juror in the hallway, which was just as open to the public as was the courtroom. Longan does not show that he was denied his right to a public trial.

Ninth, Longan argues that his trial counsel was ineffective because he did not allow Longan to testify in his own behalf. But he presents no evidence that he desired to testify in his own behalf or that his trial counsel prevented him from doing so. He fails to show ineffective assistance of counsel.

Tenth, Longan argues that his trial counsel was ineffective because he told the jury that there would be enough evidence for the jury to find Longan guilty of some crimes. But admitting lesser crimes in an effort to gain acquittals on the greater crimes was a tactical decision. Such tactical decisions cannot be challenged as ineffective assistance of counsel. *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986).

Eleventh, Longan argues that the trial court erred in not hearing motions brought by Longan's mother, his purportedly attorney-in-fact. But Longan presents no legal basis for the trial court to consider motions brought by a person other than the defendant or his counsel.

Twelfth, Longan argues that cumulative error denied him his right to a fair trial. But he shows no error, and his argument fails.

The State presented sufficient evidence of Longan's culpability for all three counts of first degree assault. His SAG arguments are meritless.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Houghton, J.

We concur:

Bridgewater, J.

Van Deren, C.J.